NO. 88-2018

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

STATE OF ILLINOIS,

Petitioner,

vs.

EDWARD RODRIGUEZ,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT THIRD DIVISION

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QUESTION PRESENTED FOR REVIEW

I

Whether the Illinois Appellate Court has correctly interpreted the Fourth Amendment by Requiring that a third party have actual authority to consent to a warrantless entry of a home.

II

Whether the Illinois Appellate Court correctly interpreted Federal law in holding that Gale Fisher lacked actual authority to consent to the warrantless entry of the respondent's apartment.

TABLE OF CONTENTS

	PAGE
Question Presented For Review.....	i
Table of Contents.....	ii
Table of Authorities.....	iii
Opinion Below.....	1
Jurisdiction.....	2
Statement of the Case.....	2
Reason for Denying the Writ.....	3
I. The Illinois Appellate Court has correctly interpreted the Fourth Amendment by requiring that a third party have actual authority to consent to a warrantless entry of a home.	3
II. The Illinois Appellate Court correctly interpreted Federal law in holding that Gale Fisher lacked actual authority to consent to the warrantless entry of the respondent's apartment.	16
Conclusion.....	23

TABLE OF AUTHORITIES

Cases	PAGE
Cooper v. California, 386 U.S. 58 (1967).....	10
Fox Film Corp. v. Muller, 296 U.S. 207 (1935).....	10
Henry v. Mississippi, 379 U.S. 443 (1965).....	10
Herb v. Pitcairn, 324 U.S. 117 (1945).....	15
Minnesota v. National Tea Co., 309 U.S. 551 (1940).....	10
People v. Adams, 53 N.Y.2d 1 (1981).....8, 9, 11, 12	
People v. Bochniak, 93 Ill.App.3d 575 (1981).....	14
People v. Jackson, 116 Ill.App.3d 340 (1983).....10, 11	
People v. Miller, 40 Ill.2d 154 (1968).....	14
People v. Rodriguez, Slip Op. (Ill. App.Ct.)No. 86-2887.....12, 13, 18, 19	
People v. Shambley, 4 Ill.2d 38 (1954).....13, 14	
People v. Vought, 174 Ill.3d 563 (1988).....	14
People v. Walker, 34 Ill.2d 23 (1966).....	13

United States v. Leon,
468 U.S. 897 (1984).....4, 5

United States v. Matlock,
415 U.S. 164 (1974).....3, 4
13, 16-20, 22

United States v. Miller,
800 F.2d 129 (1986)..... 6

Statutes and Rules

United States Supreme Court Rule 17.. 19

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Respondent, EDWARD RODRIGUEZ, respectfully prays that Petitioner's Petition for Writ of Certiorari to the Appellate Court of Illinois, First Judicial District, Third Division, be denied.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First Judicial District, Third Division is attached to the Petition for

Writ of Certiorari to the Appellate Court of Illinois, First Judical District, Third Division, as Appendix A.

JURISDICTION

The Statement of Jurisdiction stated by the Petitioner is adequate.

STATEMENT OF THE CASE

The Petitioner's statement of the case is adequate and acceptable to the Respondent.

REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I

THE ILLINOIS APPELLATE COURT HAS CORRECTLY INTERPRETED THE FOURTH AMENDMENT BY REQUIRING THAT A THIRD PARTY HAVE ACTUAL AUTHORITY TO CONSENT TO A WARRANTLESS ENTRY OF A HOME.

The Illinois Appellate Court correctly interpreted the Fourth Amendment when it refused to recognize the existence of a "good faith exception" to the warrant requirement when a police officer enters a person's home in reliance upon the consent of a third party. Moreover, the decision of the Illinois Appellate Court is supported by an adequate and independent state ground.

In United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974), this Court held that the Fourth Amendment requires that a third party may consent to the

search of a residence only when that person has actual authority to do so.

The Petitioner claims that United States v Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984) permits a "good faith" exception to the Matlock rule, so that a third party with mere apparent authority may consent to a warrantless police entry. Leon does not, either expressly or by implication, approve the notion of apparent authority to consent. The holding in Leon was that when a police officer, in good faith, has obtained a search warrant from a neutral and detached magistrate and acted within its scope, evidence thereby obtained should not be suppressed. 468 U.S. at 920-21. The underlying rationale of Leon is that there is no police illegality when officers rely on a finding of probable cause by a magistrate; the deterrence aspect of the

exclusionary rule would therefore not be served by suppression.[1]

The rationale of Leon does not apply where, as here, there exists no good faith reliance by police officers on a warrant issued by a neutral and detached magistrate. In fact, the officers made no attempt to secure a warrant or corroborate information provided by Gail Fisher. There are no objective facts upon which the officers could in good faith believe that Ms. Fisher has authority to consent to the entry. Thus, the deterrence aspect of the exclusionary rule is served by suppression

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[1]The affidavit in Leon did not establish probable cause because the information contained therein was fatally stale and the affidavit failed to establish the informant's credibility. 468 U.S. at 905-06.

in the instant case.[2]

Assuming, arguendo, that this Court chooses to adopt the apparent authority exception to the warrant requirement, the facts presented here do not permit the conclusion that the officers reasonably believed that Gail Fisher had the authority to consent to the search. The officers responded to a call to proceed to Mrs. Jackson's home, rather than the defendant's. There is no evidence that any of the five officers so much as asked Ms. Fisher if she ever resided at the California apartment. She was never asked

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[2]Petitioner's reliance on United States v. Miller, 800 F.2d 129 (7th Cir. 1986) as authorizing the apparent authority exception is likewise misplaced. Although Miller in dicta vaguely refers to apparent authority, the holding was that a third party, by the defendant's actions, had actual authority to act as a custodian of records for purposes of complying with a subpoena to disclose such records. 800 F.2d at 135.

whether her name was on the lease. Officer Entress stated that "I didn't go into specifics with her as if she just moved out or anything like that." (R.10) At the preliminary hearing, Officer Entress testified that Ms. Fisher told him she "used to live there."

Officer Entress made no effort to learn whose name the apartment was in. (R.15) He admitted that he could not determine from his conversation with Ms. Fisher whether she was living in the apartment every day. (R.28) Officer Entress concluded that Ms. Fisher resided at the defendant's home merely because that was the site of the alleged battery. (R.12) A sound application of the apparent authority doctrine should require that police make reasonable inquiries to determine the third party's relationship to the area searched. The record here is

totally devoid of any efforts on the part of the police to determine Ms. Fisher's status vis-a-vis the defendant's apartment. (R.13) Under these facts, the Petitioner's claim of "good faith" and "reasonable belief" must fail. The Petitioner's reliance on People v. Adams, 53 N.Y.2d 1, 422 N.E.2d 537 (1981), cert. denied, 454 U.S. 854, therefore proves too much. In adopting the apparent authority doctrine, the Adams court warned:

> We emphasize that the police belief must be reasonable, based upon an objective view of the circumstances present and not upon the subjective good faith of the searching officers. Moreover, a warrantless search will not be justified merely upon a bald assertion by the consenting party that they possess the requisite authority. Nor may the police proceed

> without making some inquiry into the actual state of authority when they are faced with a situation which would cause a reasonable person to question the consenting party's power of control over the premises or property to be inspected. In such instances, bare reliance on the third party's authority to consent would not be reasonable and would, therefore, subject any such search to the strictures of the exclusionary rule."

422 N.E.2d at 541.[3]

Regardless of the current state of federal law, the decision of the Illinois Appellate Court is supported by an independent and adequate state ground, so

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[3]The Petitioner's claim that the adoption of apparent authority by other state courts mandates that this Court hold likewise is without merit where, as here, there exists both Federal and Illinois law to the contrary.

that this case does not present a proper occasion to consider whether to modify federal law requiring actual authority to consent. It is a basic principle of federal jurisprudence that "this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions." Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). See also Minnesota v. National Tea Co., 309 U.S. 551, 558 (1940); Henry v. Mississippi, 379 U.S. 443, 446 (1965). Any modification of the actual authority doctrine would violate basic principles of comity and federalism. This Court recognised in Cooper v. California, 386 U.S. 58 (1967) that a State may impose higher standards on searches and seizures than that required by the Federal Constitution if it so chooses. See also People v. Jackson, 116 Ill.App.3d

340, 452 N.E.2d 85 (1983).

In this case, the decision of both the trial court and appellate court is firmly grounded on Illinois law. In rejecting the State's apparent authority argument the trial court stated:

> In terms of the officers' relying on the apparent authority theory, with the support of People versus Adams, an out of state case, can be instructive if there is no controlling Illinois case. And there does seem to be a controlling Illinois case in People versus Miller.
>
> What the Illinois reviewing courts would decide today based on the United States Supreme Court cases cited by the State holds some doubt, leaves the question perhaps somewhat open, a crack in the door. But I think I am obliged to follow the present situation in Illinois which would not

allow for police to act on the apparent authority of the person in allowing the search of an apartment, the person in this case being Gayle Fisher. Maybe that will change. It might change tomorrow.

The present state of the law does not allow for it and Adams can only be instructive and I think can only really be acted on and adopted by a reviewing court and not by the trial court, given the fact that there are Illinois reviewing court opinions on the subject.

(R.16-17)

Despite the trial court's "invitation", the Illinois Appellate Court chose to adhere to the Illinois case law rejecting the apparent authority argument:

> In reviewing the record in the instant case, we note that the trial court properly rejected the State's con-

> tention that Fisher had the apparent authority to consent. This conclusion is consistent with prior Illinois cases rejecting the argument that warrantless entries and searches may be upheld if the party who consented to the entry had apparent authority to do so but lacked actual authority.

People v. Rodriguez, Slip Op. at 12.[4]

The Illinois courts have a long history with regard to the actual authority doctrine. The "joint right of access" test enunciated by this Court in Matlock in 1974 had already been the law in Illinois for several decades. See, e.g. People v. Walker, 34 Ill.2d 23, 213 N.E.2d 552 (1966); People v. Shambley, 4 Ill.2d 38, 122 N.E.2d 172 (1954). Moreover, the

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[4]The decision of the Illinois Appellate Court is found in Appellant's Appendix A.

Illinois reviewing courts continue to reject the notion of "apparent authority" despite recent repeated attempts to the contrary. In the instant case, the Illinois Supreme Court declined review when one of the issues presented was "apparent authority". In People v. Miller, 40 Ill.2d 154, 238 N.E.2d 407 (1968) the Illinois Supreme Corut specifically rejected the State's claim that a search was reasonable merely because a third party had apparent authority to consent. The apparent authority argument was also rejected in People v. Vought, 174 Ill. App.3d 563, 528 N.E.2d 1095 (1988) (now on Petition for Certiorari before this Court, filed May 12, 1989) and People v. Bochniak, 93 Ill. App.3d 575, 417 N.E.2d 722 (1981).

To reach the issue of apparent authority this Court must first agree with the Illinois Appellate Court that

Petitioner has failed to show actual authority. However, once this issue is decided, the evidence must be suppressed because controlling Illinois case law mandates that consent searches be supported by actual authority. Thus, the modification of the actual authority doctrine would contravene settled law prohibiting this Court from issuing merely advisory opinions in which there is no genuine case or controversy. Herb v. Pitcairn, 324U.S. 117, 125-26 (1945). Because of the Illinois tradition of actual authority, this case does not present an appropriate occasion for Review by Certiorari.

II

THE ILLINOIS APPELLATE COURT CORRECTLY INTERPRETED FEDERAL LAW IN HOLDING THAT GALE FISHER LACKED ACTUAL AUTHORITY TO CONSENT TO THE WARRANTLESS ENTRY OF THE RESPONDENT'S APARTMENT.

The Illinois Appellate Court held that Gale Fisher did not possess actual authority to consent to the warrantless entry of Respondent's apartment. This decision, affirming the trial court, is clearly supported by Illinois and Federal case law and is therefore not properly subject to review by this Court.

This Court defined the guidelines for third party consent searches in United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974). The Matlock rule requires that the third party offering consent have common authority in and have an equal right of access to the premises:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

415 U.S. at 172, n.7, (citations omitted).

The Illinois Appellate Court correctly applied the Matlock "joint right

of access" test to the facts presented in this particular case:

> The application of this doctrine requires a determination as to whether the consenting party had sufficient common authority to consent to the entry of the premises ...

People v. Rodriguez, Slip. op. at 11. The Appellate Court relied on the following factors to find that Gale Fisher lacked the common authority over the premises to validly consent to the search:

> (1) Ms. Fisher's name was not on the lease and she did not contribute to the rent; (2) defendant's apartment was not her exclusive or even her usual place of residence, rather, she was an infrequent visitor, guest or invitee; (3) she did not have access to the apartment when defendant was not there and, like a guest, she only had access

when defendant was present; (4) she never brought people over to the apartment; and (5) she moved her clothes, and more importantly, her children to her mother's residence.

People v. Rodriguez, Slip. Op. at 13.

The Petitioner maintains that the Illinois Appellate Court erred in its application of Matlock yet cites no specific ground for this contention. It appears that the Petitioner is merely proposing an interpretation of the facts other than that reached by the Illinois courts. In other words, the Petitioner's second argument is really a claim of "insufficient evidence" -- a ground that has never presented an appropriate subject for review by Certiorari by this Court. See United States Supreme Court Rule 17.

Moreover, the facts in the instant

case permit only one conclusion -- that Ms. Fisher lacked the right of joint access to the defendant's home that is necessary for a valid consent under Matlock. Gail Fisher was not even a co-occupant of the California apartment. Officer Entress testified that Ms. Fisher had a key to the apartment and said that she "had" been living there. (R.10) However, on cross examination, Entress stated that he didn't know from this conversation whether Ms. Fisher was living at the apartment every day. (R.28) He gave the following version at the preliminary hearing:

> Q. Did Gail Fisher tell you she lived at 3510 South California?
> A. She stated she used to live there.

(R.10-11).

Mrs. Jackson agreed that Ms. Fisher moved into her home on July 1, 1985. (R.36)

The two later returned to the California apartment, where Ms. Fisher retrieved her own and her childrens' clothing. (R.39-40) Large appliances and bulky furniture were left behind. (R.42) Between July 1 and July 26, Ms. Fisher slept at her mother's home every night except 2-3 times. (R.46) Thus, Ms. Fisher had adopted a new residence in the area.

Ms. Fisher testified that she moved in with her mother on July 1, 1985. (R.68) She did not tell the police officers on July 26, 1985 that she lived at the defendant's apartment. (R.70) She obtained the key to the defendant's home on July 26, 1985 without his permission or knowledge. (R.71-72) She left some large items of furniture behind, only because the defendant had a need for them while she did not. (R.82, 95) Ms. Fisher was not on the lease to California apartment. She did not

contribute to the rent either before or after July 1, 1985. (R.101) Perhaps the most telling evidence is that after July 1, 1985, Ms. Fisher never went to the defendant's apartment by herself or with friends when he was not present. (R.102)

Based on these facts, the Illinois Appellate Court's conclusion that Ms. Fisher did not have the common authority over the Respondent's apartment that was necessary to validate her consent is a correct interpretation of the Matlock joint access test.

CONCLUSION

The Illinois Appellate Court, and the Circuit Court of Cook County correctly applied the law regarding third party consent to warrantless entries and this cause presents no constitutional question of sufficient import to merit review by this court.

The Petition for Certiorari advanced in this case should be denied.

Respectfully submitted,

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